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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 143

THE UNITED STATES OF AMERICA, PETITIONER

v.

HELEN J. STEVENS, ADMINISTRATRIX, ET AL.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the District of Massachusetts is reported in 15 F. Supp. 139. The opinion of the United States Circuit Court of Appeals for the First Circuit is reported in 89 F. (2d) 151.

JURISDICTION

The judgment of the Circuit Court of Appeals for the First Circuit was entered March 15, 1937 (R. 27). The petition for a writ of certiorari was filed June 15, 1937, and was granted October 11, 1937 (R. 28). The jurisdiction of this Court rests upon the provisions of Section 240 (a) of the

Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a contract between the National Home for Disabled Volunteer Soldiers and an applicant for membership, which provides that in the event of the applicant's death while a member of the Home all his personal property shall at once pass to the Board of Managers of the Home subject to be reclaimed within five years by any legatee or person entitled thereto by inheritance, is valid and enforceable.

2. Whether the Act of June 25, 1910, c. 384, 36 Stat. 703, 736, is unconstitutional.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix, *infra*, pp. 28–30.

STATEMENT

The agreed statement of facts (R. 11–14) may be summarized as follows:

Thomas McGovern, an honorably discharged veteran, on November 11, 1925, was admitted to the Southern Branch of the National Home for Disabled Volunteer Soldiers at Hampton, Virginia, hereinafter sometimes referred to as the "Home", where he died on September 17, 1928 (R. 11).

In compliance with the terms of the Act of June 25, 1910, *infra*, pp. 28–29, at the time of his admission and in his application, he agreed as follows (R. 14):

> The said Thomas McGovern hereby agrees that, in event of his death while a member of the National Military Home for Disabled Volunteer Soldiers, leaving no heirs at law or next of kin, all personal property owned by him at the time of his death, including money or choses in action held by him and not disposed of by will, whether such property be the proceeds of pensions or otherwise derived, shall vest in and become the property of said Board of Managers for the sole use and benefit of the post fund of said home, *and that all personal property of the said Thomas McGovern shall upon his death, while a member, at once pass to and vest in said Board of Managers, subject to be reclaimed by any legatee or person entitled to take the same by inheritance at any time within five years after the death of such member;* * * * [Italics supplied.]

McGovern died on September 17, 1928, and was survived by a wife and four children, one of whom, a son, had been declared insane in 1918 (R. 11, 12). Prior to 1904 McGovern's family had lived with him in Chelsea, Massachusetts. Thereafter he continued to reside in Chelsea, and his son lived with him until commitment to the asylum in 1918. The wife and other children, however, lived apart. For the last twenty years of McGovern's life they had no knowledge of his whereabouts (R. 12). In his application McGovern stated that he was married and had four children living, but that "the name and address of his wife, or nearest relatives, is un-

known" (R. 13). When McGovern died, the Home did not make any attempt to locate his wife or children, and they did not learn of his death until October 19, 1935 (R. 12), more than five years after it occurred. At the time of his death, McGovern, whose legal domicil was Chelsea, Massachusetts, had a deposit in the Chelsea Trust Company which, on July 3, 1925, amounted to $3,841.10, represented by account No. 1295 (R. 12). He also had a deposit in the Boston Five Cents Savings Bank which, on October 15, 1925, amounted to $1,980.10, represented by account No. 701775 (R. 12). It does not appear that any claim for the property was ever filed by the respondents with the Board of Managers of the Home.

On April 10, 1936, a bill of complaint was filed by the United States in the United States District Court for the District of Massachusetts against the Chelsea Trust Company and the respondents, in which bill the United States alleged that the trust company refused to pay over to it the amount of the deposit because of the claim of the respondents, and asked that the bank deposit be turned over to it (R. 1–3). The bill was answered by the trust company, by Helen J. Stevens, who had theretofore been appointed administratrix of the estate of Thomas McGovern, and by the heirs of Thomas McGovern, the answers denying the application of the statute to the particular facts (R. 4–10). On June 5, 1936, the District Court entered judgment for the United States (R. 15), and

on appeal this judgment was reversed by the Circuit Court of Appeals for the First Circuit, one judge dissenting (R. 22–27).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the Act of June 25, 1910, is unconstitutional.

2. In holding that the Act of June 25, 1910, attempts to control the descent and devolution of the property of the members of the Home contrary to the provisions of the Tenth Amendment to the Constitution.

3. In holding that the Act should have provided for notice by publication or otherwise of a member's death.

4. In failing to hold that a valid and enforceable contractual relation was established between the Home and the member upon his admission.

5. In reversing the judgment of the District Court for the District of Massachusetts.

SUMMARY OF ARGUMENT

I

Pursuant to the Act of June 25, 1910, *infra*, p. 28, McGovern, the deceased, duly signed an agreement upon his admission to the National Home for Disabled Volunteer Soldiers which provided that, in the event of his death while a member of the Home, all his personal property should at once pass to and vest in the Board of Managers of the Home,

subject to be reclaimed within five years by any legatee or person entitled to take the property by inheritance. The terms of this agreement are explicit and leave no room for construction. The contract was for a valuable consideration and its provisions are eminently reasonable. McGovern was entitled to dispose of his property by contract as he chose. Instead of cutting off completely the rights of the relatives in the event of his intestacy, he put those rights to the hazard of assertion within five years of his death. Nothing is more reasonable than to suppose that an aged and disabled veteran would prefer to have his property go to his associates in his last home rather than to relatives who are so out of contact with him that they do not learn of his death until more than five years after it has occurred.

II

It does not appear that the agreement which McGovern made, as thus construed, offends any policy or provision of law of the Commonwealth of Massachusetts. While no discussion has been found in the Massachusetts cases of any precise analogue of this contract, decisions concerning essentially similar contracts seem to place its validity beyond doubt. The effect of the contract is to create a property right enforceable in equity against whoever is in possession of the property.

III

The court below held that the Act of June 25, 1910, was unconstitutional because it invaded the reserved powers of the States in that it purported to regulate the descent and distribution of property within the various States. The court has clearly misapprehended the purpose and effect of the statute. It makes no attempt to regulate or affect, in and of itself, the devolution of property within any State. It simply defines the contractual conditions upon which a veteran may obtain entrance into a Veterans' Home. The subject of the contract is one with which the Government had a right to deal, since it affected an instrumentality which the Government had created and maintained and as to which it had the right to define conditions of admission. There is no showing that the contract would not have been fully enforceable under State law. Nor is any authority cited to show that the only property rights created by such a contract are those which would be recognized by State law. Since the respondents' rights are entirely dependent upon the contract between McGovern and the Home, the question of their right to notice of his death is merely one of construction of the contract.

IV

Since the provisions of the Act of June 25, 1910, appear not to be severable, affirmance of the judgment below would seem to require abandonment of

the holding in *National Home for Disabled Volunteer Soldiers* v. *Wood*, 299 U. S. 211, that the Act of 1910 supersedes the Act of July 1, 1902, with respect to the disposition of pension moneys of a deceased member.

ARGUMENT

I

The contract between Thomas McGovern and the National Home for Disabled Volunteer Soldiers (to which the United States has succeeded as a party, Act of July 3, 1930, *infra*, p. 29) contained two provisions here significant. It was agreed, first, that if McGovern died while a member of the Home leaving no heirs at law or next of kin all his personal property not disposed of by will should vest in and become the property of the Board of Managers of the Home. Secondly, it was agreed that, in any event, upon McGovern's death while a member of the Home, all his personal property should at once pass to and vest in the Board of Managers, subject to be reclaimed by any legatee or person entitled to take the property by inheritance within five years after such death.

The terms of this contract are explicit and appear to leave no room for construction. Manifestly the second part of the contract cannot be ignored. Its purpose, on the face of the instrument, is plain. Had the first provision stood alone, the Home would have had no certain means of determining when it was entitled to apply the prop-

erty to its ultimate purpose—expenditure for the sole use and benefit of the post fund of the Home, to provide comforts and entertainment for the surviving members in addition to those furnished by the Government. See *In re McGhee's Estate,* 268 N. Y. S. 79, 82, 83. There was need for such means both in the case in which the surviving member was not known to have left any heirs or next of kin and in the case in which the identity, location, or continued existence of relatives known once to exist was unknown. The second provision of the contract appears clearly to have been inserted to meet these contingencies. By the terms of the contract the Board of Managers of the Home acquired title to the personal property of the deceased member immediately upon his death, subject to the claims of the designated persons duly asserted within the designated period. At the expiration of that period the Board's title became absolute. The plain language of the contract refutes any other construction.

The contract as thus construed is an eminently reasonable one. There can be no dispute that the Home might have imposed any conditions which it saw fit as conditions precedent to the admission of a member, provided that such conditions did not contravene any provision of law. Indisputably, the gratuitous support and care of the member constitutes a valuable consideration for such a contract. Thus, the law is well settled that a home

for aged, infirm or other persons may require as a consideration for admission that members assign to it absolutely not only all property of which they may be possessed but all property which they may acquire thereafter.[1] *Newburyport Soc. Rel. Aged Women* v. *Noyes*, 287 Mass. 530; *St. Benedict Order* v. *Steinhauser*, 234 U. S. 640. The present contract is none the worse for not having gone to this extreme. The Home dealt with transparent fairness with prospective members. The member was to be left in substantially complete control of his property. He could dispose of it by will. Or he could permit it to pass by intestacy, subject only to being claimed within the designated period by the persons entitled to claim it.

The respondents mistakenly assume that the contract intended, or by law was required, to preserve the rights of a member's heirs or next of kin as they would have been if no such contract had been made. The heirs or next of kin had no abso-

[1] It has been customary for certain Federal and State homes for old soldiers to require either by contract or otherwise that such members contribute part of the pension which they receive as a partial contribution toward the upkeep of the home. *United States* v. *Bowen*, 100 U. S. 508; *Brooks* v. *Hastings*, 192 Pa. St. 378; *O'Donohue* v. *Soldiers' Home*, 65 N. J. L. 484; *Howell* v. *Sheldon*, 82 Neb. 72; *Ball* v. *Evans*, 98 Iowa 708; *Brownlee* v. *Board of Directors*, 22 Cal. App. 207; *Treadway* v. *Board of Directors*, 14 Cal. App. 75. This is true notwithstanding the fact that the Congress has exclusive power to legislate concerning the disposition of pension money while that money retains its identity as such. Compare *Trotter* v. *Tennessee*, 290 U. S. 354, 356; *McIntosh* v. *Aubrey*, 185 U. S. 122.

lute right in the member's property. He might have used it for his own benefit, or given it away. He might by contract have assigned it outright to the Home. Or he might have provided that, failing disposition of the property by will, it should vest at once and absolutely in the Home upon his death. Instead of cutting off thus completely the rights of his relatives in the event of his intestacy, he put those rights to the hazard of assertion within five years of his death. There is no ground whatever for supposing that the contract, which plainly had this effect, did not have this intention. Nothing is more reasonable than to suppose that an aged and disabled veteran would prefer to have his property go to his associates in his last home rather than to relatives who are so much out of contact with him that they do not learn of his death until more than five years after it has occurred.

The facts of the present case, as disclosed by the record, afford striking illustration of the probable intention of the contract and of its fairness and reasonableness as so construed. The deceased's wife, Anne J. McGovern (who died in 1933), lived with the deceased in Chelsea, Massachusetts, until 1904 (R. 12). At that time the wife and the respondent daughters separated from the deceased. For the last twenty years of the deceased's life, they had no knowledge of his whereabouts, although he continued to reside in Chelsea and still had a legal residence there at the time of his death

in 1928 (R. 12). Meanwhile the wife and daughters took up their residences in Boston and in New Haven (R. 12). The inference appears clear that the wife and daughters, having left Chelsea while the deceased remained there, had it within their power to learn of his whereabouts. Upon his entrance into the Home in 1925 Thomas McGovern stated that he had a wife and four living children but that their names and addresses were unknown to him (R. 13). In these circumstances he made a contract which in simple and comprehensible terms provided that in return for the care to be given him all his personal property should, in the event of his death while still a member of the Home, "at once pass to and vest in said Board of Managers, subject to be reclaimed by any legatee or person entitled to take the same by inheritance at any time within five years after" his death. There is no reason to suppose that Thomas McGovern had any other intention than that his property should go to the Board for the benefit of the post fund, as provided, in the event that his wife and children—supposing them to be still living—failed to claim the property within the stated period, as they did fail.

II

The opinion of the court below is devoid of evidence or argument to show that the contract between McGovern and the Home, as thus construed, offends any policy or provision of law of the Commonwealth of Massachusetts. The respondents in

their brief in opposition offer no such authority on the point, and we have been able to discover none. We do not find in the Massachusetts decisions a discussion of any precise analogue of this contract. Decisions concerning essentially similar contracts, however, appear to place the validity of the present agreement beyond doubt.

As long ago as 1864, the Supreme Judicial Court of the Commonwealth stated (*Jenkins* v. *Stetson*, 9 Allen 128, 132):

> That it is competent for a party to stipulate for the disposition of his property at the time of his decease is too well settled to admit of doubt or question. The validity of such an agreement has often been recognized by this court. *Fitch* v. *Fitch*, 8 Pick. 480. *Trull* v. *Eastman*, 3 Met. 121. *Canada* v. *Canada*, 6 Cush. 15.

Closely analogous to the agreement in question are contracts to pay money or deliver property at death. In *Krell* v. *Codman*, 154 Mass. 454, a person executed in England a covenant in solemn form that her executor should pay a certain sum to the promisee. Mr. Justice Holmes, speaking for the Court, stated (p. 456 *et. seq.*):

> In our opinion, such a covenant as the present is not contrary to the policy of our laws, and could be enforced here if made in this State. If it were a contract upon valuable consideration, there is no doubt it would be binding. *Parker* v. *Coburn*, 10 Allen 82. * * * So, again, until lately

> an oral contract founded on a sufficient consideration to make a certain provision by will for a particular person was valid. *Wellington* v. *Apthorp,* 145 Mass. 69. Now, by statute, no agreement of that sort shall be binding unless such agreement is in writing, signed by the party whose executor is sought to be charged . * * *.
>
> * * * There is no question here of any attempt to evade or defeat rights of third persons, which would have been paramount had the covenantor left the sum in question as a legacy by will. There is no ground for suggesting an intent to evade the provisions of our law regulating the execution of last wills,—if such intent could be material when an otherwise binding contract was made. See *Stone* v. *Hackett,* 12 Gray 227, 232, 233. * * *

See also *Parker* v. *Coburn,* 10 Allen 82; *Howe* v. *Watson,* 179 Mass. 30.

The contract in question was executed for a valuable consideration. It was in writing. Manifestly, the court below to the contrary notwithstanding (R. 26), it entailed no violation of "the provisions of * * * law regulating the execution of last wills."[2] The circumstance that the

[2] The court stated (R. 26) that the contract "was at most but an attempt to make a future testamentary disposition of McGovern's property, when such a disposition could only be effected by will." The court gave no explanation for this construction of the contract, nor any citation of authority for this view of Massachusetts law. See, further, pp. 16–18, *infra.*

ultimate beneficial interest of the promisee depended upon the failure of the promisor to execute a will, and of his heirs or next of kin to assert their claims, affords no ground of differentiation from the cited cases. Compare *Davis* v. *Ney*, 125 Mass. 590; *Jones* v. *Old Colony Trust Co.*, 251 Mass. 309. No question is here presented of the rights of creditors, assuming that they have such rights. In the words of Judge Morton, dissenting below (R. 27):

> Contracts to dispose of one's property in a specified way at one's death are valid. *Ex parte Simons*, 247 U. S. 231; *Jenkins* v. *Stetson*, 9 Allen (Mass.) 128; *Parker* v. *Coburn*, 10 Allen (Mass.) 82. It has also been held that the particular form which the contract takes is not material; if the intention is clear and the consideration adequate and there was no taint of fraud or overreaching, the contract will be enforced. * * *
>
> * * * The whole matter is one of contract, and I see no sufficient reason for not giving full effect to the contract which McGovern made. * * *

If there be any possible question concerning the validity of the contract, it relates to the right of the United States under the contract to claim or retain possession of the property in the first instance as against the administrator. But that question in no view is presented here. For even

assuming that the rights of an administrator to custody of, and title to, the property were originally superior to those of the United States, the rights of the administratrix in the present proceedings are plainly not so superior. If the contract were no more than "an attempt to make a future testamentary disposition," as the court below suggested (p. 14, *supra*), and if the only right of the United States under it were to bring suit against the estate at the end of five years, the United States would be entitled here to prevail. A contract to make a future testamentary disposition is valid and enforceable in the Commonwealth of Massachusetts, as well as elsewhere.[3] The obligee of such a contract may maintain a suit against the administrator or executor of the estate of the deceased who stands in precisely the same place as would have stood his intestate or testator. *Donovan* v. *Walsh*, 238 Mass. 356, 361; *Howe* v. *Watson*, *supra*; *Harrison* v. *Conlan*, 10 Allen (Mass.) 85, 86. It does not affirmatively appear that the estate of McGovern owed any debts, and it has been held in similar circumstances that equity will refuse to enforce the naked legal right of an administrator to possession of the personal property of the deceased where such administrator

[3] See, in addition to the cases cited *supra*, pp. 13, 14, *Ex parte Simons*, 247 U. S. 231; *Brooks* v. *Yarbrough*, 37 F. (2d) 527 (C. C. A. 10th); *Richardson* v. *City Trust Co.*, 27 F. (2d) 35 (C. C. A. 7th); *Russell* v. *Jones*, 135 Fed. 929 (C. C. A. 5th).

has no duty to perform other than to turn over the money to the person entitled thereto. *Pierce* v. *Boston Savings Bank,* 129 Mass. 425, 434; *Lewis* v. *Lyons,* 13 Ill. 117, 121–122; *People* v. *Abbott,* 105 Ill. 588, 599; *Richardson* v. *Cole,* 160 Mo. 372, 377, 380. The contract being enforceable against the administratrix, and the suit being in equity, the Court can adjudicate the rights of all persons concerned without the necessity of remitting the United States to an independent action against the administratrix.

We do not believe, however, that such procedure is required under this contract or under the law of Massachusetts. The contract creates an immediate right in the Board of Managers (and now in the United States) upon the promisor's death. A contract to pay money at death is enforceable against the estate immediately upon death. *Parker* v. *Coburn, supra; Krell* v. *Codman, supra.* It would seem that this contract likewise gave rise to an immediate right to possession of any property of the deceased which might have been in the hands of an administrator or of third persons. Even in the case of contracts to make a will, the rule appears to be that an immediate property right is created in the promisee which is enforceable in equity against whoever is in possession of the property. In *Jenkins* v. *Stetson, supra,* a bond was executed for valuable consideration, providing that if at the death of the obligor "the said per-

sonal estate * * * shall come into the hands and possession of the said Jenkins or his heirs by will or otherwise, * * * then this obligation shall be void; otherwise, shall remain in full force." The obligee was held entitled to sue at once for the amount of the penalty and to be awarded execution for the amount of the property, as against the contention that no action could be maintained until the estate had been settled. Similar agreements have been held specifically enforceable in many cases. See *Bolman* v. *Overall*, 80 Ala. 451, 2 So. 624; *Keefe* v. *Keefe*, 125 Pac. 929 (Calif. App.); *Best* v. *Gralapp*, 69 Neb. 811, 815; *Brooks* v. *Yarbrough*, *supra*.

The existence of such a right, as the decisions under these contracts show, is in no way inconsistent with the normal functioning of the laws relating to the administration of decedents' estates. Those laws would continue to function as occasion might arise. Whether or not administration proceedings would have been required to establish the right of the United States to immediate possession of the property, had that right been asserted, they would have been necessary to settle any controversy as to the rights of claimants against the Home and as to the rights, if any, of creditors. Had such claims been advanced, the United States would have taken any action at its peril, in the absence of administration proceedings. Here, however, no claims were advanced and administration proceedings were not required.

III

The court below disposed summarily of the contract which McGovern made by stating "that the contract based upon the Act rises no higher than the Act on which it is based" (R. 26). The Act itself (Act of June 25, 1910, c. 384, Sec. 1, 36 Stat. 736) the court declared to be unconstitutional and void as "in violation of the reserved rights of the States," citing *United States* v. *Butler*, 297 U. S. 1.

We are unable to understand the reasoning by which the court arrived at this conclusion. The decision, we submit, is patently erroneous. At the commencement of its discussion the court said (R. 25):

> * * * the question arises, under what provision of the Constitution Congress acquired power to enact a law providing that, upon the death of a member, all of his personal property of the character here in question shall "at once pass to and vest in said Board of Managers" and not in the administrator or administratrix of his estate appointed under the laws of the State in which he was domiciled at the time of his death, and where it will be administered according to such laws for the benefit of his creditors and heirs at law or next of kin. No such provision has been called to our attention and we know of none.

Congress enacted no such law as that stated. The Act of June 25, 1910, does not provide by enactment what shall happen to the personal property of a

member upon his death. It does not apply to members theretofore admitted. As to members thereafter to be admitted it states only the conditions of their admission. Even as to such members it does not provide that the conditions stated shall automatically attach upon admission. Rather it specifically directs the Board of Managers to obtain "the consent of the applicant to accept membership upon the conditions herein provided." Plainly the Act of June 25, 1910, does not present the constitutional question which was stated, discussed and decided by the court below.

The source of Congressional power to give directions to the Board of Managers of the National Home for Disabled Volunteer Soldiers as to the terms upon which members shall be admitted does not appear to be doubtful. It is the same power by which under the Constitution that Home has been established and continuously maintained. We do not understand the court below to have questioned the constitutionality of the Home. The Federal Government plainly has an authority apart from contract over the members of such Homes—to provide for the discipline of the Home, dishonorably to discharge members, to stipulate the conditions upon which members shall remain in the Home, including the extent to which they shall contribute to its financial support. It has a more extensive authority to provide for the formation of contracts with members concerning these matters.

So long as these contracts are entirely voluntary and supported by adequate consideration, and so long as they are reasonably germane to the purposes for which the Home is conducted, no ground appears upon which their legally binding character can be assailed.

United States v. *Butler, supra,* assuredly affords no precedent for an assault upon the contract here in question. In that case, this Court held that a contract entered into pursuant to the Agricultural Adjustment Act was invalid because economic pressure was exerted against the farmer to sign it, and because the object sought was compliance with regulatory measures which the United States had no power to impose directly. No such situation is here presented. The soldier was not coerced to sign the contract. His entrance into the Home was optional. *O'Donohue* v. *Soldiers' Home,* 65 N. J. L. 484, 486; *Ball* v. *Evans,* 98 Iowa 708, 715. Nor were the terms of the contract which he was asked to sign as a condition of entrance themselves coercive. Under the contract the soldier remained at liberty to dispose of his personal property as he saw fit, either by disposition during his life or by will in the event of his death. In case of intestacy the contract itself provided, in effect, that his heirs would have had a right to assert a claim. Finally, the contract did not seek, or purport to seek, consent to any exercise of regulatory power. It was a contract affecting property rights as between

the Home and the member, similar to those regularly made between such institutions—private as well as public—and persons seeking admission thereto. The rights granted the Home were a form of compensation—and an entirely proper form—for the otherwise gratuitous care and support to be given the member.

A constitutional question of any character arises under the contract only if it be assumed that the contract would not have been enforceable according to its terms, under applicable State law, if it had been made between a privately conducted home for aged persons and a member. It has already been pointed out (pp. 12–18, *supra*) that the opinion of the court below fails entirely to show that the contract would not have been so enforceable. Citation is unnecessary for the proposition that an Act of Congress may not be declared unconstitutional upon grounds which are speculative or hypothetical or unproved. Nor is a constitutional issue presented under the Tenth Amendment in the absence of a showing that authorization of the contract in question was not a proper exercise by Congress of its power to establish and conduct the National Home for Disabled Volunteer Soldiers. Not in any view does the unreasonableness and inappropriateness of the authorization, as an exercise of that power, appear with the requisite clarity to warrant its disregard.

The power of the State which the court below deemed to have been invaded appears to have been its power to provide for the administration of decedents' estates and to determine the rules of descent and distribution. A contract which creates a property right enforceable against the administrator or other person in possession of a decedent's property cannot in any just sense be said to be a forbidden exercise or infringement of that power. The contract here in question does no more than create such a property right, in the same fashion as the familiar types of contracts already discussed (see pp. 13–18, *supra*). It gives to the Board of Managers of the Home the right to the decedent's personal property, upon his death, subject only to the claims of any legatee, heir, or next of kin duly asserted within five years. Who are the legatees or heirs entitled to claim the property would necessarily be determined by the laws of the State of the decedent's domicil, as the contract itself recognizes. The contract was indubitably made in furtherance of an activity in which the Federal Government is constitutionally authorized to engage. We are aware of no authority, and none has been cited, holding that the only property rights created by such a contract are those which would be recognized by State law. Compare *United States* v. *Butler, supra*, at p. 74; *First National Bank* v. *California*, 262 U. S. 366, 369, 370.

In addition to holding that the Act of June 25, 1910, violated the Tenth Amendment, the court below intimated that the validity of the statute was doubtful under the Fifth Amendment. The ground of the doubt was the failure of the Act to require that notice of the death of a member be given the next of kin, the suggestion being that the Act thus permitted property to be taken without due process of law (R. 24–25). The court did not specifically declare that enforcement of the contract would deprive the respondents of property belonging to them; but that was evidently its assumption. It seems manifest that the assumption is untenable. As already pointed out (pp. 10–11, *supra*) the heirs or next of kin have no absolute right in a member's property. Prior to McGovern's death, his property was subject to whatever disposition he saw fit to make of it, by gift, contract or will. He actually made a contract. The only rights which the respondents possess in the property covered by this contract are those which arise out of the contract. Compare *White* v. *United States,* 270 U. S. 175, 180, 181. The question as to the duty to give notice, therefore, is a question arising under the contract, not under the Constitution. Enough has been said (pp. 8–12, *supra*) to show that the contract imposed no such duty upon the Home. The duty lay upon the next of kin to institute the appropriate proceedings under State law to determine heirship and to present their claims.

It cannot be said that the contract is inequitable in this respect or that it works any hardship. These respondents had taken no steps to learn the address of their father for a period of over twenty years, and remained unaware of his death until approximately seven years had passed. The father, who professed not to know the names or addresses of his next of kin, voluntarily entered into a contract providing that the claims of respondents, if any, in his property should be presented by them within five years, which required that they should at least keep in sufficient touch with him to learn when he had died. Thereafter he deliberately refrained from executing a will disposing of the property in respondents' favor. In these circumstances, the five years having passed without claim, the respondents' rights in the property are lost.

IV

In *National Home for Disabled Volunteer Soldiers* v. *Wood*, 299 U. S. 211, this Court considered the Act of June 25, 1910, in its application to pension moneys of deceased members. It was there decided that that Act had superseded the Act of July 1, 1902, *infra*, p. 28, in which a different provision had been made for the disposition of pension moneys of a deceased member of the Home. While the question here presented was not considered in the *Wood* case, it should be pointed out that an affirmance of the judgment under review would

probably require an abandonment of the decision there made.

Speaking of the *Wood* case, the court below said that it assumed that Congress had the power to determine the disposition of gifts of pension money, and that the Act of June 25, 1910, was constitutional insofar as it made provision therefor (R. 26). Whether the Act is susceptible to such an interpretation is extremely doubtful. This Court has frequently stated that in the absence of a saving clause the presumption is against the severability of a statute. It has been declared to be the general rule that the unobjectionable part of a statute can not be deemed severable unless it clearly appears both that legal effect can be given to such part standing along, and that the Congress intended that part so to stand.[4] There appears to be no ground to suppose that Congress would have enacted the Act of 1910 if it were to be applied to pension moneys of deceased members alone. On the contrary, the context of the Act and the Congressional debates (Cong. Rec., Vol. 45, pp. 7011–7013, 7101) make clear that the primary intent of Congress was to comprehend all personal property of deceased members of the Home, not to authorize contracts providing another manner in which

[4] *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 312–313; *Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 362; *Utah Power Co.* v. *Pfost*, 286 U. S. 165, 185; *Dorchy* v. *Kansas*, 264 U. S. 286, 289–290; *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 241–242.

pension moneys would pass. Indeed, until this Court's decision in the *Wood* case, a conflict of opinion existed as to whether pension moneys were comprehended at all in the statute. 299 U. S. at 212.

If, as found by the court below, the Act in question were unconstitutional in so far as it authorized contracts relating to the disposition of personal property other than pension moneys, it would seem to follow that the entire Act would fail. We do not believe, however, that the statute is unconstitutional in any part.

CONCLUSION

It is respectfully submitted that the decision of the court below is incorrect, and that the case should be reversed with instructions to the court below to affirm the decision of the District Court.

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APPENDIX

Act of July 1, 1902, c. 1351, 32 Stat. 552, 564 (U. S. C., Title 24, Sec. 139):

> Hereafter any balance of pension money due a member of the National Home for Disabled Volunteer Soldiers at the time of his death shall be paid to his widow, minor children or dependent mother or father in the order named, and should no widow, minor child, or dependent parent be discovered within one year from the time of the death of the pensioner, said balance shall be paid to the post fund of the Branch of said National Home of which the pensioner was a member at the time of his death, to be used for the common benefit of the members of theHome under the direction of the Board of Managers, subject to future reclamation by the relatives hereinbefore designated, upon application filed with the Board of Managers within five years after the pensioner's death.

Act of June 25, 1910, c. 384, 36 Stat. 703, 736 (U. S. C., Title 24, Sec. 136):

> Hereafter the application of any person for membership in the National Home for Disabled Volunteer Soldiers and the admission of the applicant thereunder shall be and constitute a valid and binding contract between such applicant and the Board of Managers of said home that on the death of said applicant while a member of such home, leaving no heirs at law nor next of kin, all personal property owned by said applicant

at the time of his death, including money or choses in action held by him and not disposed of by will, whether such property be the proceeds of pensions or otherwise derived, shall vest in and become the property of said Board of Managers for the sole use and benefit of the post fund of said home, the proceeds to be disposed of and distributed among the several branches as may be ordered by said Board of Managers, and that all personal property of said applicant shall, upon his death, while a member, at once pass to and vest in said Board of Managers, subject to be reclaimed by any legatee or person entitled to take the same by inheritance at any time within five years after the death of such member. The Board of Managers is directed to so change the form of application for membership as to give reasonable notice of this provision to each applicant and as to contain the consent of the applicant to accept membership upon the conditions herein provided.

Act of July 3, 1930, c. 863, 46 Stat. 1016, 1017 (U. S. C., Title 38, Sec. 11d):

SEC. 5. (a) When the consolidation and coordination herein provided for shall have been effected in the Veterans' Administration the President shall so declare by proclamation or order, whereupon the corporation known as the National Home for Disabled Volunteer Soldiers and the Board of Managers shall cease to exist.

(b) All contracts and other valid and subsisting obligations of the corporation, the National Home for Disabled Volunteer Soldiers, shall continue and be and become obligations of the United States, and the United States shall be considered as substituted for

said corporation with respect to all such demands either by or against said corporation, unless and until they shall thereafter be superseded or discharged according to law. The outstanding obligations assumed by the United States by virtue of the provisions of this subdivision may be enforced by suit in the Court of Claims or in the district courts of the United States according to the ordinary provisions of law governing actions against the United States, and such courts shall have the power to enter judgment against the United States, with interest, in the same manner and to the same extent as if said corporation were party defendant. No such suit shall be maintained upon any cause of action existing at the time of the dissolution of said corporation or arising simultaneously therewith, unless brought within two years from the time of such dissolution.

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